



STATE OF KANSAS  
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SECRETARY OF  
DEPT. HEALTH & ENVIRONMENT

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September 23, 2009

Roderick L. Bremby, Secretary  
Kansas Department of Health  
and Environment  
Curtis State Office Building  
1000 SW Jackson Street, Suite 560  
Topeka, Kansas 66612

Dear Secretary Bremby:

You inquire whether federal and state law provide immunity from potential tort claims for individuals participating in the administration of the 2009 H1N1 influenza vaccine (H1N1 vaccine).

**Federal Law: Public Readiness & Emergency Preparedness Act (PREP Act)**

On June 25, 2009, Kathleen Sebelius, the Secretary for the Department of Health & Human Services, issued a declaration<sup>1</sup> providing immunity pursuant to the PREP Act. This immunity protects a "covered person" from "suit and liability under federal and state law" with respect to "all claims for loss<sup>2</sup> caused by, arising out of, relating to, or resulting from the administration to or the use by an individual" of the H1N1 vaccine.<sup>3</sup> The immunity period commences on June 15, 2009 and extends through March 31, 2013.<sup>4</sup>

A "covered person"<sup>5</sup> includes H1N1 vaccine program planners such as state and local governments and their employees, Indian tribes, supervisors and administrators of H1N1 vaccine programs, individuals who provide policy guidance, including technical or scientific

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<sup>1</sup>Federal Register: June 25, 2009 (Vol. 74, No. 121).

<sup>2</sup>Death; physical, mental, or emotional injury, illness, disability; fear of physical, mental, or emotional injury, illness, or disability; loss of or damage to property, including business interruption. 42 U.S.C.S. § 247d-6d(a)(2).

<sup>3</sup>42 U.S.C.S. § 247d-6d(a).

<sup>4</sup>42 U.S.C.S. § 247d-6d(b)(2)(B); Federal Register: June 25, 2009 (Vol. 74, No. 121) at § III. The Secretary may amend the declaration to extend the immunity period. 42 U.S.C.S. § 247d-6d(b)(3)(4).

<sup>5</sup>"Person" includes an individual, private entity, public or private corporation, including a federal, state or local government agency or department. 42 U.S.C.S. § 247d-6d(i)(5). "Covered person" is defined at 42 U.S.C.S. § 247d-6d(i)(2).

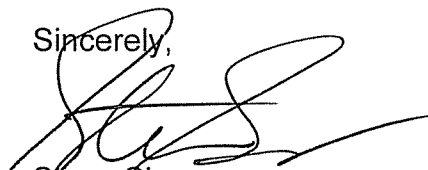
advice, and individuals providing facilities for administration or use of the H1N1 vaccine.<sup>6</sup> "Covered persons" also includes licensed health care professionals and individuals authorized to prescribe, administer, or dispense the H1N1 vaccine.<sup>7</sup> Immunity does not apply when death or serious physical injury is proximately caused by "willful misconduct."<sup>8</sup>

## State Law

In addition to the PREP Act, the Kansas Tort Claims Act<sup>9</sup> (Act) may provide immunity for state and municipalities,<sup>10</sup> their employees and certain health care providers.<sup>11</sup> The Act provides that governmental entities and employees acting within the scope of employment are not liable for damages resulting from "any claim . . . limited or barred by any other law or which [claim] is for injuries . . . against an officer, employee or agent where the individual is immune from suit."<sup>12</sup> The Act also provides immunity for claims arising out of emergency management activities governed by K.S.A. 48-904 *et seq.*<sup>13</sup>

Whether immunity applies in a particular situation will depend upon the facts. However, it appears that both federal and state law provide broad immunity for individuals involved in H1N1 influenza vaccine programs.

Sincerely,



Steve Six  
Attorney General

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<sup>6</sup>42 U.S.C.S. § 247d-6d(i)(2)(B)(iii); (i)(6).

<sup>7</sup>42 U.S.C.S. § 247d-6d(i)(2)(B)(iv); (i)(8). "Covered persons" also includes manufacturers and distributors of the vaccine.

<sup>8</sup>42 U.S.C.S. § 247d-6d(d). "Willful misconduct" defined at 42 U.S.C.S. § 247d-6d(c).

<sup>9</sup>K.S.A. 75-6101 *et seq.*

<sup>10</sup>Counties, townships, cities, school districts, other political or taxing subdivisions of the state. K.S.A. 2008 Supp. 75-6102(b).

<sup>11</sup>K.S.A. 75-6115; 75-6120.

<sup>12</sup>K.S.A. 2008 Supp. 75-6104(i). The Act also provides immunity for claims based on discretionary functions. K.S.A. 2008 Supp. 75-6104(e).

<sup>13</sup>K.S.A. 2008 Supp. 75-6104(j). K.S.A. 48-915 (immunity for liability arising out of emergency management activities). Emergency management activities include disasters resulting from contagious or infectious disease. K.S.A. 48-904(a)(d).